BEFORE THE

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Federal Communications Commission

WASHINGTON, D.C. 20554

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In re Application of	)	
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MCI COMMUNICATIONS CORPORATION	)	GN Docket No. 96-245
	)	
For Transfer of Control	)	
of Direct Broadcast Satellite Authorization	)	
(File No. 73-SAT-P/L-96) To	)	
	)	
BRITISH TELECOMMUNICATIONS PLC	)	

To: The Commission

REPLY TO OPPOSITION

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SUMMARY

MCI Communications Corporation's Opposition & Reply has not shown any reason for the Commission to ignore the significant international trade and other public interest concerns raised by the proposed transfer of the last remaining full-CONUS Direct Broadcast Satellite ("DBS") authorization from MCI Telecommunications Corporation ("MCI") to British Telecommunications plc ("BT"), a foreign (U.K.) company, to be used to deliver video programming and information from an entity controlled by The News Corporation Ltd. ("News Corp."), also a foreign (Australia) company. In fact, the U.S. trade position in the recently concluded World Trade Organization ("WTO") telecommunications agreement highlights the need for the Commission to carefully scrutinize the openness to U.S. companies of the Australian and U.K. DBS and programming service markets.

In its offer to the WTO, the U.S. specifically excluded DBS and DTH services, not only reserving the right to control access to the U.S. DBS market by application of reciprocity measures or through international agreements guaranteeing market access, but also recognizing that certain foreign DBS and satellite programming markets are closed to U.S. service providers and programmers. Indeed, U.S. firms face onerous restrictions in seeking to provide video programming and subscription television services in both the U.K. and Australia. In light of the U.S. trade position, the Commission should not approve foreign ownership and control of a U.S. DBS system, such as MCI's, knowing there will also be foreign ownership and control of the entity which will make programming decisions over that system, without a determination that the home markets of the prospective DBS licensee and the programming entity afford reciprocal access to U.S. interests.

The above-captioned proceeding is certainly a proper forum in which the Commission must address the alien ownership and international trade issues related to the proposed 100% alien ownership of MCI's DBS system. In its order finding MCI's DBS application "ready for grant" ("Initial MCI Order"), the Commission's International Bureau expressly affirmed the public's right to comment on any issues raised by the proposed transfer of MCI's DBS authorization to BT. Moreover, the Commission has clearly anticipated addressing such issues in connection with this transfer application. Because the Initial MCI Order, now on appeal, was simply wrong in concluding that alien ownership concerns were irrelevant to MCI's DBS grant, that order cannot govern the full Commission's review of MCI's application to transfer control of its DBS authorization to BT.

Further, in addressing the alien ownership and international trade issues raised by MCI's transfer of control application, the Commission must focus not only on the licensee of the DBS station, but also on the entity that will select, package and market all of the DBS program services over this system. The passage of Section 335 of the Communications Act in 1992 put all prospective DBS licensees on notice that Congress has required the Commission to recognize for regulatory purposes that DBS "service" is provided by the entity responsible for content selection, packaging and marketing of the actual DBS service delivered to customers, not just the licensee responsible for the technical parameters of the DBS satellite. Indeed, News Corp.'s extensive involvement in MCI's DBS authorization and its pivotal role in ensuring the success of the service provided over the facilities covered by that authorization demand that the Commission examine the openness of both BT's and News Corp.'s home markets to U.S. interests.

MCI's DBS authorization is the last full-CONUS allocation available for award by the U.S. government. Accordingly, if the FCC fails to seize this opportunity to condition the license transfer on a finding of reciprocal entry opportunities for U.S. firms in the U.K. and Australian satellite and video programming markets, the final opportunity to advance important U.S. trade policy objectives will be forever lost. The FCC must not approve the transfer of control of MCI's DBS authorization to BT until the Commission has conducted a thorough analysis of the U.K. and Australian satellite service and video programming markets. Commission consent to the transfer of MCI's DBS license to BT should be specifically conditioned on full access to those markets by U.S. firms. The Commission's only viable alternative is to require strict compliance with Section 310(b) of the Communications Act and Section 100.11 of the Commission's rules, by requiring BT to reduce its stake in the DBS licensee to no more than 25 percent and News Corp. to reduce the aggregate foreign interest in the newly-formed "Sky" entity to no more than 25 percent, conditions analogous to those imposed in the recent NextWave case.

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To: The Commission

REPLY TO OPPOSITION

Time Warner Inc. ("Time Warner"), by its attorneys, herein replies to the Opposition & Reply ("MCI Opposition") filed on February 24, 1997 by MCI Communications Corporation and British Telecommunications plc ("BT") with regard to Time Warner's Petition To Deny Or Condition Grant ("Time Warner Petition to Deny") of the above-captioned application.[1/] MCI's Opposition provides no basis for the Commission to ignore the significant international trade, market access, and other public interest concerns raised by the proposed transfer of the last remaining full-CONUS DBS authorization in the United States from MCI Telecommunications Corporation ("MCI") to BT, a foreign (U.K.) company, to be used to deliver video programming and information to be selected and provided by an entity controlled by The News Corporation Ltd. ("News Corp."), also a

[1/]Time Warner's Reply is timely filed pursuant to the pleading cycle established in Public Notice No. DA 96-2079, released Dec. 10, 1996. Time Warner's Petition to Deny was limited to the proposed transfer of MCI's Direct Broadcast Satellite ("DBS") license. Time Warner has taken no position regarding the transfer of MCI's other licenses and authorizations.

foreign (Australia) company. Indeed, as explained herein, the U.S. trade position in the recently concluded World Trade Organization ("WTO") telecommunications trade talks now demands close Commission scrutiny of the openness of the home markets of those entities. In particular, by excluding DBS and DTH services from its offer to the WTO, the U.S. recognized that certain foreign DBS and satellite programming markets are closed to U.S. service providers and programmers. In order to avoid undermining important U.S. international trade objectives, the Commission must either deny the above-captioned application or grant the application subject to a condition that appropriate measures be taken to ensure full access by U.S. companies to the U.K. and Australian video programming markets.

THE COMMISSION MUST SCRUTINIZE THE PROPOSED ALIEN OWNERSHIP OF MCI'S DBS AUTHORIZATION AND THE ASSOCIATED DBS PROGRAMMING PROVIDER IN LIGHT OF IMPORTANT INTERNATIONAL TRADE AND PUBLIC INTEREST ISSUES.

A. The Commission Has An Obligation To Consider Alien Ownership Issues In This Proceeding.

Initially, MCI asserts that, because the Commission's International Bureau (the "Bureau") "rejected petitioners' foreign ownership arguments" in its order finding MCI's DBS application "ready for grant,"[2] Time Warner is somehow precluded from now raising any issues related to the proposed alien ownership of MCI's DBS system.[3] To the contrary, in its Initial MCI Order, the Bureau expressly affirmed the public's right to

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[2] See In re Application of MCI Telecommunications Corporation For Authority to Construct, Launch and Operate a Direct Broadcast Satellite System at 110° W.L., Order, DA 96-1793, released Dec. 6, 1996 ("Initial MCI Order").

[3] See MCI Opposition at 34-35.

comment on any issues, including foreign ownership or control issues, raised by the proposed transfer of MCI's DBS authorization to BT in connection with the transfer applications.[4] Moreover, the Commission has clearly anticipated addressing alien ownership and international trade issues in connection with this transfer application.[5] Accordingly, since the Bureau correctly chose not to prejudge any of the possible issues involved regarding MCI's DBS transfer of control application, Time Warner and other parties are free to raise in this proceeding any relevant concerns, including those related to alien ownership and international trade.

Furthermore, the Bureau's Initial MCI Order concluded incorrectly that the foreign ownership restrictions applicable to DBS codified at Section 100.11 of the Commission's rules are not applicable to "non-broadcast" DBS. Accordingly, several parties have filed timely applications for review of that order, all of which remain pending.[6] Time Warner will not further burden the record by reiterating those arguments here.[7] Nevertheless, the

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[4]Initial MCI Order at ¶¶ 9, 29.

[5]See "The Hard Road Ahead -- An Agenda For The FCC in 1997," Reed E. Hundt, Chairman, Federal Communications Commission, Dec. 26, 1996 at 12 ("We also anticipate that in ruling on the anticipated petition to transfer control of MCI's licenses to British Telecom, the FCC will be asked to consider a variety of issues that affect international telecommunications, such as the implications of such a transfer of control on trade policy, foreign policy and national security"); FCC News, No. 71293, released Dec. 13, 1996 (announcing that the new Senior Legal Advisor to the Chief, Telecommunications Division, International Bureau "will direct and coordinate the Telecommunications Division's review of certain foreign carrier U.S. market entry issues, including the proposed BT/MCI merger").

[6]These parties include EchoStar Satellite Corporation, PRIMESTAR Partners L.P. and National Association for Better Broadcasting.

[7]Time Warner's Petition to Deny in this proceeding provides further arguments demonstrating the fallacy of the Bureau's reasoning in its Initial MCI Order. See Time Warner Petition to Deny at 5-10.

applications for review fully demonstrate that the erroneous reasoning in the Initial MCI Order now on appeal cannot govern the full Commission's review of MCI's application to transfer control of its DBS authorization to BT.

Even if the Commission were to affirm the Bureau's determination that the 1987 Subscription Video decision[8/] repealed sub silentio Section 100.11 of the Commission's rules, which was specifically promulgated to apply foreign ownership restrictions to all DBS services, the public interest compels that the Commission revisit that conclusion now in light of important international trade and reciprocal market access issues. Indeed, Chairman Hundt has noted that even if the recently concluded WTO telecommunications trade agreement necessitates abandonment of the Commission's Effective Competitive Opportunities ("ECO") test applicable to telecommunications facilities and services and its proposed ECO-Sat test for satellite services, the Commission will still carefully scrutinize the competitive impact of proposed transactions involving foreign applicants under a rigorous public interest analysis.[9/] Thus, even if foreign ownership rules are found not to impose across-the-board limits on foreign ownership of subscription DBS licensees by any foreign entities, the Commission nevertheless has the obligation to consider the crucial international trade issues raised by this specific transfer of control application, which proposes to award the benefits of the last full-CONUS DBS slots to foreign companies from countries -- U.K.

[8/] Subscription Video, 62 RR 2d 389 (1987), *aff'd. sub nom.* National Association of Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

[9/] See "FCC To Drop ECO Test, Use Public Interest Review For Foreign Applicants," Communications Daily, Feb. 20, 1997.

and Australia -- where U.S. firms do not enjoy market access even remotely comparable to that sought by U.K. and Australian interests in this transaction.

B. The Commission's Foreign Ownership Inquiry Must Focus On The DBS Provider In Addition To The DBS Licensee.

MCI argues that the Commission should not concern itself with the foreign ownership of non-licensee parties, such as DBS service providers, using U.S.-licensed facilities.[10/] In the case of DBS, however, Congress has specifically mandated that public interest regulations be imposed not only on licensees, but on providers as well. The central and vital role to be played by News Corp. in MCI's DBS venture confirms what Congress has recognized -- that DBS "service" may actually be provided by an entity other than the licensee. Accordingly, the Commission's general policy with respect to fixed-satellite transponder sales and leases, cited in support by MCI,[11/] does not govern here. As will be explained below, News Corp., the exclusive programmer for MCI's DBS facilities, is much more than a mere transponder lessee.

Initially, Section 335 of the Communications Act (the "Act")[12/] requires the

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[10/] See MCI Opposition at 36-37.

[11/] Id. at n.84.

[12/] 47 U.S.C. § 335. Contrary to MCI's assertion at footnote 83 of its Opposition, Time Warner did not argue that Section 335 of the Act imposes on DBS licensees "the full panoply of broadcast regulation," including alien ownership limits. Rather, Time Warner noted that Section 335 undermines the Bureau's rationale in the Initial MCI Order that broadcast-type obligations (said to include alien ownership restrictions) are generally inapplicable to DBS. In fact, Section 335 reflects Congress' recognition that DBS does have certain broadcast-type attributes and therefore is subject to certain broadcast-type public interest obligations. Pursuant to Section 335, the Commission has unfettered jurisdiction to impose "public interest or other requirements for providing video programming" on DBS service providers. In any event, the alien ownership concerns raised by Time Warner do not rest only on the

(continued...)

Commission to recognize for regulatory purposes that DBS "service" is provided by the entity responsible for program content selection, packaging and marketing of the actual DBS service delivered to consumers, not just the licensee responsible for the technical operation of the DBS satellite. The legislative history of Section 335 is clear that the requirements therein

> are intended to apply only to direct broadcast satellite providers, which the Commission shall interpret to mean a person that uses the facilities of a direct broadcast satellite system to provide point-to-multipoint video programming for direct reception by consumers in their homes. The Committee does not intend that the licensed operator of the DBS satellite itself be subject to the requirements of this subsection unless it seeks to provide video programming directly.[13]

Accordingly, in enacting Section 335, Congress intended to impose public interest obligations upon those who provide DBS service over DBS satellites. As the exclusive service provider for MCI's DBS satellites and a major contributor of the associated start-up costs, News Corp. is much more than a mere transponder lessee. As originally proposed, American Sky Broadcasting ("ASkyB"), a joint venture between MCI and News Corp., would actually select, package and market the DBS video programming and information to be offered on MCI's DBS facility, i.e., ASkyB would be the DBS "provider" within the

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[12](...continued)
so-called "broadcast" obligations of DBS, but stem from broader federal policies and positions regarding international trade and program access, as well as the Commission's general public interest mandate applicable to any licensing matter.

[13]H.R. Rep. No. 628, 102d Cong., 2d Sess. 124 (1992) (emphasis added). See also Implementation of Section 25 of The Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Service Obligations, NPRM in MM Docket No. 93-25, FCC 93-91, released Mar. 2, 1993 at ¶ 29 ("we believe that the reservation requirements for noncommercial, educational and informational programming . . . are intended by Congress to satisfy the public interest obligations of DBS licensees and service providers") (emphasis added).

statutory definition.[14] ASkyB was to have been a 50-50 joint venture between News Corp. and MCI, but MCI later chose to reduce its stake to 20 percent, effectively relinquishing control of the service provider to News Corp.[15] As Time Warner demonstrated, the proposed DBS service apparently would not have been viable without News Corp.'s participation. News Corp. was to contribute one-half of the start-up costs. Moreover, as principals from both MCI and News Corp. observed, the programming venture would derive significant benefits from the huge economies of scale with News Corp.'s world-wide business interests, including DBS operations in Europe (British Sky Broadcasting), Asia (Star TV), Japan (Japan Sky Broadcasting) and Latin America (Sky Entertainment Services).[16]

On February 24, 1997, News Corp. announced that it has agreed to contribute "cash, satellites and other assets of" ASkyB having a total value of $1 billion to EchoStar Communications Corporation ("EchoStar") in exchange for a 50 percent interest. MCI will own 20 percent of News Corp.'s 50 percent stake in EchoStar and will contribute use of its DBS license to the joint venture, which will reportedly be named "Sky."[17] Accordingly, MCI's DBS license will be one part of a much larger News Corp. venture controlled by News Corp. News Corp.'s President of Worldwide Satellite Operations, Preston Padden,

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[14] See Time Warner Petition to Deny at 3, 18.

[15] Id. at 18-19.

[16] Id. at 18-20.

[17] EchoStar Communications Corporation, SEC Form 8-K, filed as of March 3, 1997, Exhibit A. See also "Murdoch, Ergen take to Sky," Broadcasting & Cable, Mar. 3, 1997, at 41-42.

recently boasted about how the Sky joint venture will benefit from its membership in the News Corp. "family":

> . . . the News Corporation family provides us with absolutely unique sales resources. It doesn't take much imagination to picture the Sky Direct sales solicitation on the FOX network, in TV Guide, in our FSI's, on FOX Sports Net Channels, and in all of the other News Corp. media properties. Given the number and prominence of our sibling media outlets, we expect Sky Direct to be a potent source of subscriber activations.
>
> * * *
>
> Perhaps the biggest advantage of being part of the News Corp. family is our access to News Corp. proprietary program content from around the world. Our new platform will be a part of the corporate family that includes Twentieth Century Fox Film Corporation, Fox Broadcasting Network, Fox Sports, Fox Children's Network, the Fox Net Regional Sports Channels, Fox News and all of [News Corp.'s other] global networks and program services . . . .[18/]

Thus, News Corp.'s extensive involvement in and its pivotal role in ensuring the success of MCI's authorized DBS system underscore the wisdom of Congress' recognition in enacting Section 335 of the Act that, for DBS regulatory purposes, the Commission must focus on the entity that "seeks to provide video programming directly," and not merely on the licensee of the DBS space station. Clearly, any foreign ownership inquiry in this case must focus not only on MCI, the DBS licensee, but also on News Corp., whose involvement and capital are essential to the success of the DBS service to be provided over MCI's licensed facilities.[19/]

[18/]Remarks of Preston Padden, President, Worldwide Satellite Operations, The News Corporation, Feb. 24, 1997, Los Angeles, California, at 9.

[19/]MCI also cites Univision Holdings, Inc., 7 FCC Rcd 6672 (1992), for the proposition that the Commission does not concern itself with foreign ownership of non-licensee

(continued...)

As MCI itself recently recognized in the DISCO II proceeding (in arguing the need to address foreign content restrictions in any ECO-Sat analysis):

> Clearly, discussion of DBS service in the United States and abroad has long encompassed consideration of both the satellite transmission and the programming being broadcast. Certainly, and perhaps uniquely for DBS/DTH services, it is difficult if not impossible to isolate the satellite transmission service from the content or programming.[20]

Contrary to MCI's assertions,[21] Time Warner is not advocating "retroactive rulemaking," but rather that the Commission apply existing rules and Congressional mandates to the current case. As Time Warner noted in its Petition to Deny, Section 100.11 of the Commission's rules (a rule currently codified in the Code of Federal Regulations, despite the Initial MCI Order's attempt to effectively delete it) expressly applies the foreign ownership restrictions codified at Section 310(b) of the Act to all DBS services, without regard to whether those DBS services are classified as "broadcast," "subscription," or anything

[19](...continued)
programmers. See MCI Opposition at 36 and n.84. In Univision, the FCC merely determined that the petitioners had not presented sufficient information to demonstrate that foreign entities holding a minority interest in a broadcast licensee and providing programming to its stations exercised *de facto* control of the stations in violation of Section 310(b) of the Act. Their equity interests were within the Section 310(b) limits. The FCC's decision left open the possibility that had these foreign shareholders/programmers invested all or almost all of the required funds for the transaction (as opposed to their actually providing 16.6 percent of the purchase price) or controlled the stations' programming decisions, a finding of *de facto* control could have resulted. In the instant case, given News Corp.'s extensive financial and operational involvement in MCI's DBS authorization, such control surely exists. In any event, Univision did not involve an ECO-type analysis of trade issues -- in which programming is a central concern -- but rather a strict Section 310(b) analysis.

[20]MCI Comments, IB Docket No. 96-111, filed July 16, 1996, at 18 (emphasis added).

[21]See MCI Opposition at 37-38.

else.[22] Moreover, as previously noted, in enacting Section 335 of the Act Congress sent the clear message (1) that the Commission must recognize for regulatory purposes that DBS service is provided not just by the DBS licensee, but also by the entity responsible for program content selection, packaging and marketing of the actual DBS service delivered to customers, and (2) that broadcast-like public interest obligations are necessary and appropriate for DBS services providers. At the time of the DBS auction, MCI was on notice that Congress had instructed the Commission to focus both on DBS licensees and DBS providers for regulatory purposes. Thus, applicants in the DBS service, such as MCI, have no legitimate expectations that either the Act or the Commission's validly-promulgated DBS rules will not be applied in any particular case.[23]

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[22] See Time Warner Petition to Deny at 7.

[23] Contrary to MCI's assertion, the "regularity of the Commission's auction procedures" is not in danger here. See MCI Opposition at 38. The Commission should not ignore the wisdom of its rules and policies and should not disregard its public interest responsibilities just to ensure the "regularity" of its auction procedures. In any event, in the present case, the Commission would not have to refund the auction money paid for MCI's DBS authorization and hold a new auction. Rather, the Commission could simply require the restructuring of the DBS licensee (MCI) and the DBS programmer (News Corp.) in a fashion similar to the remedy recently imposed upon NextWave Personal Communications, Inc. ("NextWave"). In January 1997, the Commission expressly conditioned the grant of NextWave's PCS licenses, under threat of automatic cancellation, upon NextWave restructuring itself in order to comply with the Section 310(b) alien ownership limits. See In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses, Memorandum Opinion and Order, DA 97-328, released Feb. 14, 1997 ("NextWave Order"). There is no justification for the disparity in the treatment of these two applicants for new services, particularly given that MCI, unlike NextWave, will be involved in selecting and creating the content of transmissions. Further, the Commission has chosen to promulgate express rules establishing foreign ownership restrictions for both PCS and DBS, whether or not statutorily required to do so. See 47 C.F.R. §§ 24.404(b)(4), 24.804(b)(4) [PCS] and 47 C.F.R. § 100.11 [DBS]. Having established those rules, the Commission may not now pick and chose which of its own validly-promulgated rules it

(continued...)

C. The Commission Has A Public Interest Responsibility Not To Impair The Executive Branch's Efforts To Open Foreign Markets To U.S. Program Distributors.

In its Petition to Deny, Time Warner noted that the Commission's application of an ECO-type analysis to MCI's application to transfer control of its DBS authorization would enable the U.S. to maintain its negotiating leverage to maximize chances for success in international trade negotiations.[24/] Time Warner explained that permitting entities from Australia and the U.K. to benefit from this valuable U.S. license, despite the competitive barriers in their home markets, would undercut the U.S. position in ongoing trade negotiations.[25/] The U.S. trade position in the recently-concluded WTO telecommunications agreement highlights the need for the Commission to carefully scrutinize the openness to U.S. companies of the Australian and U.K. DBS and programming service markets.

In its offer to the WTO, the U.S. specifically excluded DBS and DTH services, reserving the right to control access to the U.S. DBS market by application of reciprocity measures or through international agreements guaranteeing market access.[26/] Press accounts noted that many countries, unlike the U.S., regulate DBS as a broadcast service,

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[23/](...continued) wishes to enforce. The fact that Congress has defined PCS by statute as a common carrier service has no relevance whatsoever to the applicability of the foreign ownership benchmarks contained in the Commission's rules which govern both PCS and DBS services.

[24/]See Time Warner Petition to Deny at 27-29.

[25/]Id.

[26/]See "WTO Deal Includes U.S. MFN Exemption on Some Satellite Services," Washington Telecom Week, Feb. 21, 1997, at 20.

and thus would not have included DBS in their offers to the WTO. Accordingly, U.S. negotiators removed DBS from the U.S. offer "rather than face a situation where foreign DBS . . . companies could enter the U.S. market while retaining a protected status in their home markets."[27/] The U.S. DBS exception to the WTO telecommunications agreement recognizes that certain foreign DBS and satellite programming markets are closed to U.S. service providers and programmers. In light of the U.S. trade position, the Commission should not approve foreign ownership and control of a U.S. DBS system, such as MCI/News Corp.'s, knowing there will also be foreign ownership and control of the entity which will make programming decisions over that system, without a determination that the home markets of the prospective DBS licensee and programming entity afford reciprocal access to U.S. interests.

Time Warner has already demonstrated that U.S. firms face onerous restrictions on providing video programming and subscription television services in both the U.K. and Australia.[28/] Australian law imposes both ownership and domestic content requirements on subscription video providers, and such restrictions cannot be waived.[29/] Indeed, the restrictions imposed by Australia are comparable to those adopted by Canada, which is generally regarded as a "closed" market for foreign DBS entry. In fact, Acting U.S. Trade Representative Charlene Barshefsky recently stated that the the U.S. chose to exclude DBS

[27/] "WTO Telecom Agreement Adopted Successfully," Mobile Satellite News, Feb. 20, 1997, Vol. 9, No. 4. See also "Satellite Industry Hails WTO Telecommunications Pact," Satellite News, Feb. 24, 1997, Vol. 20, No. 8.

[28/] See Time Warner Petition to Deny at 22-27.

[29/] See id. at 24-25.

and DTH services from its WTO offer "with Canada in particular in mind."[30] The following chart demonstrates the similarity between the market access restrictions imposed in both Australia and Canada:

Australian and Canadian DBS Foreign Ownership and Content Restrictions

AUSTRALIA	CANADA
Ownership: Foreign ownership in a company holding a subscription television broadcasting license is limited to 20% individually and 35% in the aggregate. *Broadcasting Services Act 1992, § 109(1)-(2).*	Ownership: Foreign ownership of a common carrier is limited to combined 46.7% direct and indirect interest. *Telecommunications Act, s. 16(3).* The same limit applies to broadcasting licensees by Order-in-Council. *Direction to the CRTC: Ineligibility of non-Canadians. SOR/96-192, P.C. 1996-479.* Canada will permit foreign satellites to provide telecommunications services to Canada as of March 1, 2000, but not DBS services. *Basic Telecommunications Service Agreement, Canadian Commitment.*
Content: Subscription television licensees that provide a service devoted predominantly to dramatic programs must ensure that at least 10% of their annual program expenditures are spent on new Australian drama programs. *Broadcasting Services Act, § 109.*	Content: DBS and other video distributors must carry a preponderance of Canadian program services. *Report of Policy Review Panel on DTH Broadcasting, April 1995.* NAFTA excludes broadcasting as a "cultural industry." *Arts. 2106, 2107.*

Obviously, the U.S. trade concern regarding onerous market access restrictions in Canada must apply in the case of Australia as well.[31] MCI has not even attempted to refute Time

[30] See "WTO Deal Includes U.S. MFN Exemption on Some Satellite Services," Washington Telecom Week, Feb. 21, 1997, at 20.

[31] In fact, in the recent Commission proceeding addressing the applications of Telquest Ventures, L.L.C. ("Telquest") and Western Telecommunications, Inc. ("WTCI") for certain (continued...)

Warner's showing regarding the closed nature of the Australian subscription video marketplace.

Further, while the U.K., as MCI notes, "has demonstrated its willingness to open the market to the greatest degree possible"[32] (at least in telecommunications), the U.K.'s willingness to open its DBS market and its future ability to do so is necessarily limited by the programming restrictions imposed on it by the European Union's ("EU") Television Without Frontiers Directive.[33] Time Warner is not attempting to "punish" the U.K. for the existence of an EU directive,[34] but rather, is merely noting that the U.K., as an EU

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[31](...continued)
licenses to be used to provide DBS service to the U.S. using Canadian satellites, the U.S. Trade Representative, the Department of State, the Department of Commerce, and the Department of Justice (collectively, the "Executive Branch") filed a joint letter with the Commission highlighting various international trade and market access issues implicated by the Telquest and WTCI applications. Because the Canadian government had not yet licensed the satellites which Telquest and WTCI wished to use, the Bureau dismissed the applications as premature and did not address the Executive Branch concerns. However, the Bureau did note that "we wish to make clear that if the satellites are ultimately licensed and the parties refile their earth station applications, we would take into serious consideration the concerns raised by the Executive Branch and would encourage the parties to address those concerns." In the Matter of the Applications of Telquest Ventures, L.L.C. and Western Telecommunications, Inc., Report and Order, DA 96-1128, released July 15, 1996 ("Telquest Proceeding"). In the instant case, the Executive Branch has already written to the Commission expressly preserving its ability to make recommendations to the Commission with respect to matters on trade and foreign policy in the event of a proposed transfer of control or assignment of MCI's DBS license. See Time Warner Petition to Deny at 4 and Exhibit 1. Accordingly, while international trade and market access issues were not yet ripe in the Telquest Proceeding, such issues are squarely presented by MCI's application to transfer control of its DBS license to BT.

[32]See MCI Opposition at 38-39.

[33]See Time Warner Petition to Deny at 23.

[34]See MCI Opposition at 39.

member state, can be required to abide by such a directive, and that such a directive may effectively limit U.S. access to the U.K. as well as other EU member countries.

CONCLUSION

Nothing in MCI's Opposition refutes the concerns raised by the Time Warner Petition to Deny. Indeed, recent developments, the U.S. position in the WTO negotiations, and the Sky/EchoStar transaction demonstrate the continuing validity of these concerns. MCI's DBS authorization is the last full-CONUS allocation available for award by the U.S. government. The Commission must not approve the transfer of control of MCI's DBS authorization to BT until the Commission has conducted a thorough analysis of the U.K. and Australian satellite service and video programming markets. If the Commission fails to seize this opportunity to condition the license transfer on a finding of reciprocal entry opportunities for U.S. firms in the U.K. and Australian satellite and video programming markets, the final opportunity to advance important U.S. trade policy objectives will be forever lost. Commission consent to the transfer of MCI's DBS license to BT should be specifically conditioned on full access to those markets by U.S. firms. The Commission must demand strict compliance with Section 310(b) of the Act and Section 100.11 of the Commission's rules by requiring BT to reduce its stake in the DBS licensee to no more than 25 percent and News Corp. to reduce the aggregate foreign interest in the newly-formed "Sky" entity to no more than 25 percent, conditions analogous to those imposed in the recent NextWave case.[35]

Respectfully submitted,

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Date: March 17, 1997

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[35] See NextWave Order, supra.

CERTIFICATE OF SERVICE

I, Kelley M. Auerbach, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that copies of the foregoing "Reply to Opposition" were served this 17th day of March 1997, via first-class mail, postage prepaid, or hand delivery, upon the following:

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